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Supreme Court, U.S.
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No. 96-554

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

SMILECARE DENTAL GROUP,
Petitioner,

v.

DELTA DENTAL PLAN OF CALIFORNIA, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Properly framed, the question presented by the Petition is whether the District Courts may dismiss a complaint that, taking all factual allegations pleaded therein as true, fails to state essential elements of a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2.

LIST OF PARTIES

Respondent concurs in the List of Parties and Rule 29.6 statement set forth in the Petition. Pet., p. ii.

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STATEMENT OF THE CASE

The essential facts pleaded by Petitioner SmileCare Dental Group ("SmileCare") in its amended complaint, and accepted as true by the Courts below, are few in number and easily summarized:

Respondent Delta Dental Plan of California ("Delta") is a dental health care plan. Amended Complaint (Pet., App. C) ¶¶ 4,

5. Delta enters into contracts with dentist "providers" to perform dental services for patients covered by a Delta program. *Id.* ¶¶ 6, 7. Among other provisions, these contracts require that provider dentists collect each patient's copayment share -- that portion of the dentist's bill not covered by Delta -- from the patient. *Id.* ¶ 8. As alleged in the amended complaint, "[t]he provider is contractually prohibited from waiving this patient co-payment charge." *Id.*

Delta determined that certain SmileCare-affiliated dentists breached their provider contracts with Delta by waiving the required patient copayments. *Id.* ¶ 11.[1] Delta took action to enforce its contracts against those dentists determined to be in breach. Pet., App. C ¶¶ 11, 12. SmileCare alleges that Delta has "market power" in some presumably relevant market, *id.* ¶ 6, and that Delta's conduct in enforcing the copayment requirement has had negative effects on SmileCare, its affiliated dentists, and consumers. *Id.* ¶¶ 19-25.

Significantly, however, in the Courts below SmileCare repeatedly disavowed any challenge to Delta's contractual requirement that dentists collect copayments from patients. *E.g.*, *Plaintiff's Opposition to Defendant's Motion to Dismiss First Amended Complaint* at 10 ("SmileCare is not challenging the co-payment requirement"); *Reply Brief of Appellant* at 2 ("SmileCare does not challenge Delta Dental's right to impose 'co-payments' on

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[1] Petitioner's statement of facts explains that, instead of collecting the patient copayment as required under the provider contract with Delta, "the dentist receives a monthly capitation payment from SmileCare. . . . In essence, rather than accepting a larger co-payment from those patients who happen to use the dentist's services that month, the dentist under the [SmileCare] supplemental plan accepts a smaller capitation payment. . . ." Pet., p. 3. Petitioner's amended complaint does not allege anywhere that dentists receive anything from SmileCare in lieu of patient copayments. However, both the District Court and the Court of Appeals presumed facts (also not alleged in the amended complaint) even more favorable to SmileCare: that SmileCare actually pays to dentists "the co-payment, or an agreed-upon portion of the co-payment." *See* Pet., App. A, p. A-6; App. B, p. B-2.

its beneficiaries or insist that its providers collect such co-payments under Delta Dental's primary coverage plan").[2]

Rejecting SmileCare's characterization of Delta's conduct as a "refusal to deal," the District Court dismissed Petitioner's original complaint with instructions and leave to amend. SmileCare's amended complaint alleged virtually identical facts, but added a new characterization of Delta's actions as a "group boycott." The District Court dismissed the amended complaint with prejudice for failure to state a claim, finding that the factual allegations did not describe any anticompetitive conduct, and, in particular, did not support a "refusal to deal," "group boycott," or any other theory of antitrust liability. The Court of Appeals affirmed.

REASONS FOR DENYING THE PETITION

A. The Petition Does Not Raise Any Conflict Of Decision, Nor Does It Present Any Other Important Question.

The Petition provides no basis for review by this Court. *See* Supreme Court Rule 10. Petitioner does not suggest that there is a conflict among the Courts of Appeals concerning the issues resolved in this case. Nor does the Petition present any important question of federal law for this Court to review, or call for an exercise of this Court's supervisory power over the proceedings of the lower courts. And, contrary to Petitioner's assertions, the decision of the Court of Appeals does not conflict with any decision of this Court. At most, the Petition raises garden variety error in ruling on a motion to dismiss.

Petitioner seems to urge adoption of a special rule of pleading immunity for complaints that purport to raise federal antitrust claims and that incorporate enough familiar antitrust phrases. Petitioner professes to find a basis for its fantastic proposal somewhere in this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), wherein the Court

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[2] If the Court deems it helpful, Respondent will upon request provide copies of these and related briefs filed with the Courts below.

upheld reversal of summary judgment on grounds that questions of fact remained. *Id.* at 477. However, far from stating a rule that would prohibit summary disposition of antitrust claims, *Kodak* simply clarified that there is no special standard for summary judgment in antitrust cases. *Id.* at 468.

While this Court in *Kodak* did remind that summary disposition is appropriate only if uncontroverted material facts and reasonable inferences support it, *id.* at 485-86, the Courts below in fact acted consistent with this well-established rule. In considering whether Delta's conduct constituted anticompetitive behavior condemned by the Sherman Act, all of the material factual allegations alleged in Petitioner's amended complaint were, of course, presumed to be true. Indeed, the Court of Appeals expressly declined to adopt any "theory" about the market benefits of copayments but instead ruled on the facts alleged. Pet., App. A, p. A-11.

Moreover, *Kodak* does not present a conflict for the obvious reason that it did not address the well-described standard applied to motions like Delta's brought under Federal Rule of Civil Procedure 12(b)(6). Nor did that case suggest procedural constraints on how lower Courts are to resolve antitrust claims when presented with undisputed or, as here, presumed facts. Not surprisingly, Petitioner points to no decision by this Court or any of the Courts of Appeals that have precluded dismissal of inadequate pleadings based upon the "precedent" Petitioner purports to find in *Kodak*. *Cf. Lee v. Life Ins. Co. of North America*, 23 F.3d 14, 18-19 (1st Cir.), *cert. denied*, ____ U.S. ____, 115 S. Ct. 427 (1994) (affirming dismissal of antitrust claim for failure to plead essential elements of a "tying" claim).

B. The Decision Below Is Correct.

Far from being in conflict with decisions of this Court or the Courts of Appeals, the decision below was entirely consistent with established precedent. The Courts applied the familiar standards for testing the sufficiency of a complaint, and, following well-accepted rules of federal antitrust law (which rules Petitioner does not challenge here), determined that Petitioner's amended complaint failed to state a claim. Whether the specific conduct alleged in the

amended complaint is anticompetitive is a question of law upon which the Courts below were competent to rule.

First, the Court of Appeals correctly grasped the significance of SmileCare's concession that the case did not involve a challenge to Delta's copayment requirement. Its ruling is consistent with numerous cases from the Ninth and other Circuits holding that, as a matter of law, antitrust liability does not arise from the enforcement by a health care plan (even one alleged to possess market power) of lawful contractual arrangements for the purchase of medical services. Pet., App. A, p. A-10, citing *Barry v. Blue Cross*, 805 F.2d 866, 872 (9th Cir. 1986); *see also Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F.2d 1101, 1104 (1st Cir. 1989); *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1391 (11th Cir. 1990); *Brillhart v. Mutual Med. Ins., Inc.*, 768 F.2d 196, 200-01 (7th Cir. 1985); *Kartell v. Blue Shield*, 749 F.2d 922, 933-34 (1st Cir. 1984) (opinion by then-Judge Breyer).

Second, the lower Courts properly rejected SmileCare's characterization of Delta's conduct as a "refusal to deal" falling under this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Pet., App. A, pp. 16-17 (holding *Aspen* inapposite for, among other reasons, failure to allege a preexisting arrangement between Delta and SmileCare, discontinuation of any such arrangement, or any change in policy by Delta in response to SmileCare's market presence). By quarreling with the Court's conclusion that Delta had a "legitimate business purpose" for its conduct, Petitioner conveniently ignores the numerous other fatal deficiencies in its theory. Certainly, Petitioner does not contend that the lower Courts misstated the elements of a "refusal to deal" claim.

Finally, Petitioner's objections to the discussion by both lower Courts regarding whether SmileCare's supplemental plan "competes" with Delta are simply irrelevant. That discussion notwithstanding, the Court of Appeals ruled that SmileCare's antitrust theories fail even assuming *arguendo* that the parties were competitors. Pet., App. A, p. A-14. And the lower Courts' conclusion that Delta may enforce the concededly-lawful copayment requirement is correct whether or not the parties are "competitors."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Dated: November 6, 1996.

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